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# Quasi-Preemption: Nervous Breakdown in Our Constitutional System

Geoffrey C. Hazard Jr.

*University of Pennsylvania Carey Law School*

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# Quasi-Preemption: Nervous Breakdown in Our Constitutional System

Geoffrey C. Hazard, Jr.\*

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## I. INTRODUCTION

A half century ago, in *The Relations Between State and Federal Law*, Professor Henry Hart of Harvard defined the public need for harmonizing the legal dictates issuing from the two levels of sovereignty established in the United States Constitution:

The law which governs daily living in the United States is a single system of law: it speaks in relation to any particular question with only one ultimately authoritative voice, however difficult it may be on occasion to discern in advance which of two or more conflicting voices really carries authority. In the long run and in the large, this must be so.

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\* © 2010 Geoffrey C. Hazard, Jr. Distinguished Professor of Law, Hastings College of the Law, University of California; Trustee Professor of Law, University of Pennsylvania. B.A., Swarthmore College; LL.B., Columbia University. Director Emeritus, American Law Institute.

People repeatedly subjected, like Pavlov's dogs, to two or more inconsistent sets of directions, without means of resolving the inconsistencies, could not fail in the end to react as the dogs did. The society, collectively, would suffer a nervous breakdown.<sup>1</sup>

## II. PREEMPTION IN PRODUCTS LIABILITY LAW

Professor Sherman and other members of the American Bar Association Task Force on Federal Preemption have finished our report on that subject, "The Relation Between State and Federal Law," as the situation exists today.<sup>2</sup> The immediate subject of our work is "tort law." In particular, it is tort law dealing with products liability and the question of whether federally promulgated safety standards for products preempt—that is supersede and displace—state law concerning products that are determined by juries to be unsafe. Salient instances of this tort law problem have concerned motor vehicles and pharmaceuticals. A paradigm of the problem is this: When the Federal Food and Drug Administration promulgates a regulation specifying the label for a drug, may a jury under state law find that the label was misleadingly incomplete?<sup>3</sup>

The answer provided by the United States Supreme Court is, correctly in my view, that there is preemption in that case.<sup>4</sup> But this does not quite end the inquiry. If a jury can find the federally prescribed warning incomplete, there is a further issue as to whether the drug also was unsafe in terms of the state's products liability law. In practice evidently, juries will often find that the drug was unsafe. On that basis, state products liability law calls for substantial damages, sometimes including punitive damages.

In this eventuality, the drug manufacturer must either take the product off the market, take the heavy risk of further jury verdicts (including punitive damages), or seek more explicit preemption through legislative or administrative action at the federal level. Often the only practical alternative is to take the product off the market. That of course will deny the product to other users, most of whom probably could use it safely. An alternative rule therefore is that state law may not impose different warning requirements where through the medium

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1. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 489 (1954).

2. See TASK FORCE ON FED. AGENCY PREEMPTION, ABA, DRAFT REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON FEDERAL AGENCY PREEMPTION (2010).

3. See *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008).

4. *Id.* at 330.

of jury verdicts the practical effect is to render ineffective the manufacturer's compliance with the federal warning requirement. But that alternative would leave the consumers who actually suffered injury without any remedy for the medical expenses and disability consequences that they have suffered.

Federal preemption, whether of drug labeling or product design (for example, automobile safety requirements), rarely addresses the issue of compensating "outlier" consumers who suffer injury from a product that federal law has classified as safe.

Thus the problem is indeed complicated. Put differently, does fulfillment of a duty of warning under federal law always and necessarily preclude a finding of liability under state tort law?

The ABA Task Force on Preemption properly limited its direct discussion of this problem of the relation between state and federal law to tort law.<sup>5</sup> That was the charge given to the Task Force by the ABA.

### III. THE LARGER PREEMPTION ISSUES

It is evident, however, that the problem of federal preemption—"the relations between state and federal law," in Professor Hart's words—is much broader and more complex.<sup>6</sup> The problem has been with us since the beginning of the Republic and now is pervasive through our legal system.

My purpose here is to sketch out the larger dimensions. I briefly recount the constitutional structure, the legal context as it has changed in the fifty years since Professor Hart published his essay, and suggest the dimensions of the problem through some illustrations. In this perspective, it is evident that our legal system has so far been incapable of dealing with "the relations between state and federal law" in a satisfactory way. As a consequence we are suffering from a condition that fairly can be called, again in Professor Hart's words, "collectively a nervous breakdown."<sup>■</sup>

### IV. THE CONSTITUTION

The relation between state and federal law is clearly defined in the Constitution, but only in brief and conclusory terms. On one hand, state law is recognized as the preexisting "base line" law, operative in each and every state unless displaced by federal law. Amendment X to the Constitution provides: "The powers not delegated to the United

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5. See TASK FORCE ON FED. AGENCY PREEMPTION, *supra* note 2.

6. See Hart, *supra* note 1.

States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>7</sup>

It is important to bear in mind the dimensions of the “powers not delegated to the United States.”<sup>8</sup> Those dimensions are the entire law of the land (except federal law), encompassed in state property law, tort law, contract law, family law, consumer law, and so on. The legal authority of the States is based on the concept of their sovereignty that existed just before the Constitution was adopted. The concept, and the political reality, was that the States had the complete sovereignty of independent nations. Accordingly, their statutory and common law—and the civil law of states such as Louisiana—were conceived and administered as comprehending all legal relationships arising in their respective territories.

The Constitution and its Supremacy Clause radically altered this comprehensive sovereignty of the States. The Supremacy Clause in Article VI of the Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.<sup>9</sup>

## V. “NECESSARY AND PROPER” FEDERAL ACTIVITIES

“Federal preemption” is the legal effect of the Supremacy Clause on state law, law that is otherwise conserved by Amendment X. The model of federal preemption by a law made “in Pursuance” of the Constitution is that which was involved in *McCulloch v. Maryland*, decided in 1819.<sup>10</sup> The situation there arose from the fact that Congress had created the Bank of the United States and the Bank had opened an office in Baltimore. The City of Baltimore undertook to impose a property tax on that branch building, apparently on the same basis of assessment as other real property. The Bank objected that the local authorities had no authority to do so. The Court’s decision, by Chief Justice Marshall, is one of the foundational pronouncements of our constitutional Law.

*McCulloch* can be read as a case involving real estate property tax imposed by a state on a federal instrumentality. Some of those

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7. U.S. CONST. amend. X.

8. *Id.*

9. *Id.* art. VI.

10. 17 U.S. 316 (4 Wheat.) (1819).

concerned with the preemption problem may prefer to read it in that technically correct way. Doing so limits the holding to the immediate situation: real estate tax on a federal building. But *McCulloch*, as pronounced by the Court, had much wider scope. Most of Chief Justice Marshall's opinion addressed the issue of whether Congress had authority to create such a bank in the first place.<sup>11</sup> That issue was a central focus of contention between the Hamiltonian Federalists, favoring a powerful national government, and the Jeffersonian Democrats, favoring a minimalist national government.<sup>12</sup>

Most of the Court's decision is an expansive interpretation of the "Necessary and Proper" Clause, which is the formula prescribing the scope of congressional authority in the subject matters delegated in Article I, Section 8.<sup>13</sup> A broad reading of "Necessary and Proper," which is what the Court gave to that Clause, is a very broad reading of the "powers delegated to the United States," the exception to the state sovereignty reserved in Amendment X. It was that broad reading of "Necessary and Proper" that was the basis of the conclusion concerning the Baltimore real property tax. The Court then held that, as a corollary, the state tax, having not been consented to by Congress, was invalid: "[T]he power to tax involves the power to destroy."<sup>14</sup>

To be sure, the decision can be considered as dealing only with such a state tax. But in subsequent constitutional history it has been the broad interpretation of "Necessary and Proper" that has been significant. The relationship between state and federal law involved in the case has come to be put in a category of "subject matter" preemption. The "subject matter" was the establishment and operation of the Bank; the Maryland tax was an impediment to operation of the Bank; the impediment was therefore impliedly prohibited by the Supremacy Clause.

## VI. "COMMERCE AMONG THE SEVERAL STATES"

Of even greater preemptive scope was the holding in *Gibbons v. Ogden*, in 1824, again in an opinion by Chief Justice Marshall.<sup>15</sup> That decision addressed whether New York could prohibit ferries traversing the Hudson River (and hence landing in New York), except for ferries

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11. See *id.*

12. See *id.* at 343-53; Sotirios A. Barber, *Judicial Review and The Federalist*, 55 U. CHI. L. REV. 836, 875 (1988).

13. U.S. CONST. art. I, § 8, cl. 18.

14. *McCulloch*, 17 U.S. at 431.

15. 22 U.S. (9 Wheat.) 1 (1824).



that had been licensed by the State of New York. New York evidently did not freely license ferries based in other states, so that ferries based in New Jersey were excluded from landing, hence being put out of business if the New York licensing law was valid.

In opposition to the New York law were two contentions.<sup>16</sup> The first was based on the fact that the Federal Government had a licensing law governing ferries. The New Jersey ferry company had complied with that requirement and hence argued (as we would say today) that federal regulation preempted the New York state law. But a broader contention was also made on behalf of the New Jersey company, or at any rate adopted by the Supreme Court. It was contended that the Commerce Clause of the Constitution itself preempted the New York regulation.

The Commerce Clause, in Article I, Section 8, authorizes Congress "[t]o regulate Commerce with foreign Nations, and among the several States."<sup>17</sup> The Court declared that the Commerce Clause precludes a state from regulating an enterprise that is engaged in commerce among the states.<sup>18</sup>

In the course of its decision, the Court defined "commerce" as "intercourse," a term of potentially very broad sweep.<sup>19</sup> If given full scope in ensuing years, the decision in *Gibbons* would have effectively prohibited all state regulations aimed at protecting local enterprise.

The subsequent decisions considering the negative effect of the Commerce Clause have been erratic. The irregular pattern reflects changing views of the appropriate relationship between federal legal policy and that of the States. In a famous decision in the late Victorian period, *United States v. E.C. Knight Co.*, the Court held a consolidation of several sugar refiners into one company was outside the scope of federal regulation.<sup>20</sup> It stated, "Commerce succeeds to manufacture, and is not a part of it."<sup>21</sup> The Court thereafter irregularly retreated from that narrow definition of federal authority, for example in *Stafford v. Wallace*, sustaining federal regulation of stockyards in which animals were held in transition from ranch to market.<sup>22</sup>

The modern endpoint in defining the scope of the commerce power has been the 1964 decision in *Heart of Atlanta Motel, Inc. v.*

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16. See *id.*

17. U.S. CONST. art. I, § 8, cl. 3.

18. *Gibbons*, 22 U.S. at 181.

19. See generally *id.*

20. 156 U.S. 1 (1895).

21. *Id.* at 12.

22. 258 U.S. 495 (1922).

*United States*.<sup>23</sup> That case and a companion, *Katzenbach v. McClung*,<sup>24</sup> upheld federal prohibition of racial discrimination in a motel and a restaurant that catered, so they said, to wholly local clientele. But the rationale for federal regulation was that, although directed at local activities, those activities “might have a substantial and harmful effect” on interstate travel by Blacks.<sup>25</sup> The federal regulation therefore displaced the underlying state law, under which the owner of a business establishment could exclude whomever he pleased.

## VII. EQUAL PROTECTION OF THE LAWS

Another field of preemption has been through the Equal Protection Clause of Amendment XIV. The salient application of federal preemption under that provision is of course *Brown v. Board of Education*, which preempted contrary state regulation of pupil assignment in state-constituted public school.<sup>26</sup> Needless to say, the principle of Equal Protection has far-reaching potential scope. It has correspondingly far-reaching federal preemptive effect.

## VIII. PREEMPTION TERMINOLOGY

Judges, lawyers, and legal scholars seeking to get a handle on these issues have evolved a preemption terminology. It includes “subject matter preemption,” “field preemption,” “express preemption,” “implied preemption,” and still other terms. These efforts aim at a general structure in which to identify, debate, and resolve issues of “the relations between state and federal law,” to use Professor Hart’s term.<sup>27</sup>

The terminology is useful up to a point, but it can also be deceptive. It has to be recognized that every preemption problem has its own specific characteristics, including such factors as the tradition of federal regulation in the specific subject matter (for example, interstate transportation compared with school curricula); the prevailing sensitivities about the subject (for example, bank interest rates versus gay marriage); the relative variation in underlying state legal policies (for example, gay marriage again), and so on.

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23. 379 U.S. 241 (1964).

24. 379 U.S. 294 (1964).

25. *Heart of Atlanta Motel, Inc.*, 379 U.S. at 258.

26. *See* 347 U.S. 483 (1954).

27. Hart, *supra* note 1, at 489.



The categories are verbalizations to define other verbalizations, a very slippery undertaking. The old decision in *Gibbons*, for example, can be called “field preemption,” meaning preemption of the general subject of interstate commerce.<sup>28</sup> On that basis, under the definition of commerce in *Heart of Atlanta*, the states could regulate very little in the way of economic activity.<sup>29</sup> The judicial and legislative resolutions have never gone that far. But that is because a residue of constitutional common sense would not go so far. The point remains that constitutional doctrine as pronounced by the Court would permit the Federal Government, through Congress, to go that far if it wished.

It is not that no generalizations about preemption can usefully be made. The thoughtful discussion in the Task Force Report has useful generalizations.<sup>30</sup> But their limits are evident even in the field of tort law, and specifically in the field of products liability law. In that field, the Supreme Court has thought there was a difference between a medical device and a pharmaceutical.<sup>31</sup> Those of us below the bench are accordingly required to proceed on the basis that there is difference in federal preemption in that situation. But we are also required to try to determine how that difference may apply in other situations, until in the indefinite future the Supreme Court provides additional clues.

## IX. THE PREEMPTION PROBLEM

This, then, is the constitutional structure in which the federal preemption issue is presented. The issue arises vividly and controversially in the field of products, as attested by the ABA Task Force report and the papers in this Symposium. The plain facts are:

- The Federal Government, under now-settled constitutional law, can regulate almost anything having to do with economics or which is definable in terms of Equal Protection. It can also regulate by providing federal grants to state and local governments for stated purposes and by imposing regulatory requirements as a condition of the grants. For example, through this mechanism it regulates the age at which young people may legally consume alcoholic beverages.<sup>32</sup>

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28. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

29. See 379 U.S. at 258.

30. See TASK FORCE ON FED. AGENCY PREEMPTION, *supra* note 2.

31. See *Wyeth v. Levine*, 129 S. Ct. 1187, 1196 (2009).

32. *South Dakota v. Dole*, 483 U.S. 203, 211-12 (1987).

- The Federal Government is persistently engaged with proposals to regulate all kinds of things having to do not only with economics, more or less, but social and moral issues as well: not only product safety, but truth in securities transactions, truth in lending, discrimination in employment, environment, health care, but also school curricula, contraception, and gay marriage. Many of these proposals are adopted as legislation or as regulations implementing legislation. Every one of these adoptions presents an issue of federal preemption.

#### X. FEDERAL INATTENTION TO THE PREEMPTION ISSUE

In neither *McCulloch* nor *Gibbons* had Congress itself addressed the effect on state law: in *McCulloch* whether the enactment creating the Bank was to displace state property tax law,<sup>33</sup> or in *Gibbons* whether the federal licensing of steamboats in “the coasting trade” was to displace state regulation of ferries.<sup>34</sup> Absence of congressional attention, and consequent legislative silence, became the typical framework in which preemption issues were addressed through the first two centuries of the Republic. The issues therefore were for judicial resolution and the outcomes were not at all uniform. It was clear that federal law was preemptive if there was conflicting state law. But the state laws being challenged often were held not to conflict with the particular federal measure, nor to invade a preempted federal field. Artful legal technique often was required in framing whether there was such interference. Perhaps the most exotic was the “original packages” doctrine, improvised after *Gibbons* but before the Civil War: Articles wrapped in original packages when they crossed state lines in interstate commerce were different from commodities that were in bulk.<sup>35</sup>

However, in the earlier period, the challenged conflicts with federal law were only occasional. That the conflicts were only occasional resulted from the background political fact that federal law was itself only occasional. Prior to the Civil War, the fundamental division of domestic political sentiment concerning slavery essentially immobilized federal regulation of internal commerce. It was not until the end of the nineteenth century that Congress, in the Sherman

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33. 17 U.S. (4 Wheat.) 316 (1819).

34. 22 U.S. (9 Wheat.) 1 (1824).

35. See *Brown v. State of Maryland*, 25 U.S. (12 Wheat.) 419, 441-42 (1827).

Antitrust Act and the Interstate Commerce Act, undertook major regulatory intervention in the economy.<sup>36</sup>

Those first steps toward regulatory activism at the national level were followed by further steps in the administrations of Theodore Roosevelt and Woodrow Wilson after the turn of the century. World War I brought more federal intervention, notably comprehensive regulation of the railroads.<sup>37</sup> It was only in the New Deal of Franklin Roosevelt's administration that federal regulation approached a dominating position.

#### XI. LITIGATION AS RESOLUTION OF PREEMPTION

Nevertheless, the primary forum for resolution of preemption issues remained federal courts, particularly the Supreme Court as in *McCulloch* and *Gibbons*. The Supreme Court exercised authority essentially by default because Congress generally continued to ignore the consequences of its legislation on state law. Accordingly, the issue of federal preemption was a matter of federal judicial process, initially in the state courts and lower federal courts, then in the Supreme Court. The persistence of that process was the factual basis for Professor Hart and Professor Herbert Wechsler to entitle their magisterial casebook "The Federal Courts and the Federal System."<sup>38</sup> It was the federal *courts* that patrolled the relationship between state and federal law in our federal system.

The Hart and Wechsler book was published shortly after Hart's 1954 law review article.<sup>39</sup> The Hart and Wechsler work has remained the scholarly and professional treatment of the preemption problem since then, and it will likely remain so for years to come. Those of us who went to law school then and in the years following have been taught that the preemption problem is one in which "the federal courts" resolve issues of "the federal system." But if the federal courts, particularly the Supreme Court, effectively handled that problem five decades ago, they do not do so now.

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36. Sherman Antitrust Act, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2006)); Interstate Commerce Act of 1887, 24 Stat. 379 (1887).

37. See, e.g., Transportation Act of 1920, Pub. L. No. 66-152, 41 Stat. 456 (1920) (codified as amended in scattered sections of 49 U.S.C.).

38. HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953).

39. See Hart, *supra* note 1.

## XII. EXPANDED FEDERAL PREEMPTION

It was merest coincidence that Professor Hart's article appeared in the same year, 1954, as the Supreme Court's decision in *Brown*.<sup>40</sup> In political and social terms, the decision in *Brown* was the most momentous judicial decision of the twentieth century, perhaps in all history. It immediately revolutionized the legal position of a substantial fraction of the American population (the Black population) and radically escalated the legal scrutiny to which local public and semi-public institutions were subject. It opened up massive federal intrusion on the political structure of state and local government—such as the Voting Rights Act of 1964 by Congress and the “one man, one vote” doctrine pronounced by the Supreme Court.<sup>41</sup> It led the courts to impose pervasive transformation of local law enforcement procedures—federally imposed restrictions on “stop and search,” the “Miranda warning,” and so on.<sup>42</sup> It led, in a parallel political and legal pathway, to national antidiscrimination legislation for protection of women, older people, and people with disabilities, as well as racial minorities.<sup>43</sup> It led, eventually, to a Black man being elected President.

*Brown* is also the preeminent federal preemption decision: The Equal Protection and Due Process provisions of the Constitution “trump” state law and local usage in *all* fields of public governance.<sup>44</sup> The ascendancy of federal regulation has led to burgeoning (although continuously disputed) “national” standards in all walks of life. Prior to 1954, Congress had regulated banking and publicly traded securities and certain other fiduciary responsibilities; labor-management relations in industrial workplaces; wage and hour terms in many other workplaces as well; agricultural production; residential mortgage finance; and, in Social Security legislation, provision for publicly funded pension. The federal hand was nevertheless relatively light. Since 1954, Congress has extended or revised federal intervention in all these fields and also addressed such subjects as private pensions, private health insurance, private places of public accommodation, private land use affecting the environment, auto safety, and divorce and marriage.

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40. 347 U.S. 483 (1954).

41. See 42 U.S.C. § 1973 (2006); *Reynolds v. Sims*, 377 U.S. 533 (1964).

42. See *Terry v. Ohio*, 392 U.S. 1 (1968); *Miranda v. Arizona*, 384 U.S. 436 (1966).

43. Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C.A. §§ 2000e-2 to 2000e-17 (2004)); Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2006); Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-6107.

44. See 347 U.S. 483 (1954).



Not only has the scope of federal intervention greatly expanded, but also the mechanisms of intervention have multiplied. Until a century ago, federal intervention took the form of either judicial decision, as in *Gibbons*, or legislative action, as in *McCulloch*—the Bank having been created by an act of Congress. Today, most of the specifications of federal intervention take the form of administrative regulations, rulings, and interpretations that expand and elaborate statutes that are typically framed in general language. To be sure, the validity and effect of these administrative dispositions depends on a statutory source provided by Congress. But the law of “administrative delegation” is now firmly established, and judicial review is generally supportive of plausible claims of administrative authority.

### XIII. CONTINUED FEDERAL INATTENTION TO PREEMPTION

The result of expanded scope and variety of federal intervention is the continuous generation of issues of “the relations between state and federal law.” However, as our ABA Task Force Report shows, in the field of torts and particularly product liability, the institutions of the federal government have not done a respectable job in defining the effect of federal interventions on preexisting state law.<sup>45</sup> As the Report notes, two recent salient Supreme Court decisions reach opposite results in medical treatment cases, one involving a drug, the other a medical device—both decisions by a 5-4 vote. In another corner of federal preemption jurisprudence, two other recent decisions, also by 5-4 vote, concluded that affirmative action in pupil assignment was permissible in professional education at public institutions, but not in primary and secondary education in other public institutions.<sup>46</sup>

To note these variant outcomes is to suggest that they are at best anomalous. That is: Why, apart from technical legal argument, should medical devices be treated differently from drugs? Why should graduate schools be treated differently from primary schools—and what about community schools and correspondence schools and support for “home schooling”? This is not to suggest that any of the opinions, majority or minority, are incoherent, “unprincipled,” in disregard of relevant legal or social considerations, or erroneous. It is, however, to note that they were the climax of prolonged, expensive, confusing, and often embittering legal and political controversy. These

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45. See TASK FORCE ON FED. AGENCY PREEMPTION, *supra* note 2.

46. See *Gutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

controversies rage inside and outside the congressional chambers, inside the offices of the agencies and of the lobbyists, inside the offices of business management and the legal profession, and on Main Street.

Under the present system, only after long travail and substantial delay do specific preemption issues rise to the Supreme Court. Indeed, most of them never make it. Instead, they are more or less resolved in the lower courts or simply by people taking the legal risk of being wrong. The list of issues on which there is “conflict among the Circuits” and “conflict among state court decisions” is long. The Court now takes only eighty cases a year, most of them dealing with other subjects. Meanwhile, out in the cities and counties, citizens, businesses, and local officials wonder and worry about what the law “is” that they are expected to obey.

It is not hard to understand why the issues of federal preemption are so badly handled. Thoughtfully analyzing the projected effect of new federal law generally requires great social awareness, intellectual acumen, and technical legal knowledge. Such is required whatever the medium of federal pronouncement, whether constitutional interpretation by the Supreme Court, a statute of Congress, or statement by an agency.

Often, if not always, those fashioning a regulatory pronouncement are preoccupied with the immediate tasks in their legal “silos.” Apart from the inherent difficulty of the issues, the participants are busy contending with dissension among colleagues, sabotage by antagonists, and often the failure of allies. Addressing preemptive effect is one more uncertainty, often an impenetrable one, standing in the way of a regulatory measure’s approval or adoption.

The result, evident from the prevailing pattern, is: Let the courts work it out *ad hoc*. That resolution is often resorted to by the courts themselves, including the Supreme Court, in decisions that often appear merely *ad hoc*. Dealing more efficiently and effectively with problems of federal preemption would be expensive and would require much more attention and self-discipline on the part of Congress, the Executive, and the agencies.

#### XIV. THE TRANSACTION COSTS OF INATTENTION

The consequence of systemic inattention to the relation between state and federal law is the continuing burden of huge transaction costs. The immediate transaction cost is expensive legal assistance, the principal beneficiaries being of course the legal profession. A measure



of the cost in legal assistance is the cost incurred by lawyers in trying to deal with the preemption issue. One simple if inexact and incomplete metric is the training required for lawyers to keep abreast of the issues. This is evidenced in the continuing legal education (CLE) that conscientious lawyers must pursue.<sup>47</sup> Attached as an Appendix are two catalogues of CLE courses run by ALI-ABA, the education consortium of the American Bar Association and the American Law Institute. One catalogue is from the 1960s when things were simpler, the other from last year. The difference is a snapshot of the transformation of the preemption problem.

The further and immensely greater costs are incurred in the risk assessments and maneuvers that businesses and governments and ordinary citizens undertake to deal with uncertainty about liability, criminal as well as civil. ("Defensive medicine" by doctors is merely illustrative.) A further cost is what can be fairly described as a collective nervous breakdown, as Professor Hart suggested.<sup>48</sup> A still further cost is cynicism about government and disrespect for the rule of law.

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47. See Appendices.

48. See Hart, *supra* note 1, at 489.

## APPENDIX A

## ALI-ABA Courses in the 1960s

Coursebook title	Number	Date	Year	Location	Subject(s)	Note(s)
National Conference on the Continuing Education of the Bar--Arden House (I)	---	12/16-19/58	1958	ArdH, HarNY	CLE	with transcript, etc.; bound; 8802; produced "CLE for Professional Competence & Responsibility"
Planning Small Estates in Pennsylvania	---	---	1960	---	RE	Lecture Outlines, Prepared by George J. Hauptfuhrer, Jr.
The Drafting of Pennsylvania Wills	---	---	1960	---	Est	Lecture Outlines, Prepared by Norman H. Brown
Lifetime and Testamentary Estate Planning	---	---	1961	---	Est	
Electronic Computers	---	10/19-21/61	1961	Chi	Comp	Legal & Practical Problems Involved in the use of Electronic Data Processing in Business. . .
A Preview of Some Legal Problems Ahead in the use of Electronic Data Processing in Business, Industry and Law	---	3/23-25/61	1961	DC	Comp	
Professional Economics--Law Office Management	---	6/22-24/61	1961	GraOH	Prac	cosp. Ohio State Bar Association
The Pennsylvania Real Estate Transaction	---	---	1962	---	RE	Lecture Outlines
Personal Injury Actions for General Practitioners	---	9/7-8/62	1962	CarlPA	Tort	cosp. Pennsylvania Bar Association & Dickinson School of Law
Conference on Continuing Legal Education	---	9/13-14/62	1962	NY	CLE	plus Proceedings volumes (2 versions); bound; 8780, 8781 & 8784

Coursebook title	Number	Date	Year	Location	Subject(s)	Note(s)
The Uniform Commercial Code	---	10/16-18/63	1963	KxTN	UCC	Presented by The Tennessee Bar Association & U of Tennessee College of Law
Corporate Counsel on the Uniform Commercial Code	---	11/21-23/63	1963	DC	UCC	
The Uniform Commercial Code	---	11/6-8/63	1963	Nash	UCC	Presented by The Tennessee Bar Association & Vanderbilt University School of Law
The Uniform Commercial Code	---	12/4-6/63	1963	Memp	UCC	Presented by The Tennessee Bar Association & Memphis State University School of Law
Second National Conference on the Continuing Education of the Bar--Arden House (III)	---	12/14-17/63	1963	ArdH, HarNY	CLE	with several transcript volumes; produced: "Arden House II: Toward Excellence in CLE", etc.
Charitable Organizations under The Internal Revenue Code	---	---	1964	---	Tax	
Revenue Act of 1964: Amended Code Sections & Controlling Committee Reports	---	---	1964	---	Tax	Specially Prepared by CCH for the Course: General Practitioners on the Revenue Act of 1964
The Uniform Commercial Code	---	10/1-3/64	1964	Char	UCC	
Uniform Commercial Code	---	11/6-7/64	1964	---	UCC	Course of Study for Montana Lawyers and Bankers
Corporate Counsel & Counsel for Corporate Clients on the Uniform Commercial Code	---	12/3-5/64	1964	StL	UCC	
Corporate Counsel on the Uniform Commercial Code	---	3/19-21/64	1964	SF	UCC	

Coursebook title	Number	Date	Year	Location	Subject(s)	Note(s)
Counseling Mid-Continent Clients who Trade Abroad	---	6/11-12/64	1964	KC	Intl	spn. by CLE of The Missouri Bar & Intl Law Div., Law Center U of Missouri at Kansas City
"The Computer in Court: Are Computer Records Legal Evidence?"	---	---	1965	---	Comp	
Computers in Redistricting	---	10/22-23/65	1965	DC	Comp	
Cost-of-Service Rate Making in the Mid-Sixties	---	11/11-13/65	1965	DC	Bank	
Virgin Islands Lawyers and Bankers on The Uniform Commercial Code	---	11/18-19/65	1965	---	UCC	cosp. The Virgin Islands Bar Association
Counseling Clients on Central and South American Trade and Investment	---	2/11-13/65	1965	NO	Bank, Intl	cosp. Louisiana State Bar Association
Charitable Organizations under The Internal Revenue Code	---	2/2/65	1965	---	Tax	prepared by CCH
Law and Computers in the Mid-Sixties	---	3/25-27/65	1965	NY	Comp	cosp. The Association of the Bar of the City of New York; with Transcript Volumes
General Practitioners on the Uniform Commercial Code	---	3/4-6/65	1965	DC	UCC	cosp. The Bar Association of DC
Young Lawyers on Secured Transactions under the Uniform Commercial Code	---	8/15-21/65	1965	Mad	Bank, UCC	
Proceedings of the ALI Joint Committee on Continuing Legal Education	---	8/8/65	1965	MiamB	CLE	79 p.; Proceedings only; bound; 8809 & 8810

Coursebook title	Number	Date	Year	Location	Subject(s)	Note(s)
Course of Study on Antitrust Law	---	8/14-20/66	1966	Mad	Govt, Anti	Advanced ALI-ABA Courses of Study for Young Lawyers on Government Regulation
Course of Study on Federal Securities Law	---	8/14-20/66	1966	Mad	Govt, Sec	Advanced ALI-ABA Courses of Study for Young Lawyers on Government Regulation; with supplements
Counseling Clients on Central and South American Trade and Investments	---	2/3-5/66	1966	NO	Bank, Intl	cosp. Tulane U School of Law, Am. Society of Intl Law, & Inter-American Bar Assn
Cost-of-Service Rate Making in the Mid-Sixties	---	3/31-4/1-2/66	1966	LA	Bank	
Charitable Organizations under the Internal Revenue Code	---	2/24-26/66	1966	Chi	Tax	cosp. ABA Section of Corp., Banking & Business Law & Section of Taxation
Course of Study on Labor Law	---	8/14-20/66	1966	Mad	Govt, Lab	Advanced ALI-ABA Courses of Study for Young Lawyers on Government Regulation
1966 ALI and ALI-ABA Joint Meeting on Continuing Legal Education	---	3/28/66	1966	NY	CLE	211 p.; transcript; bound; 8778 & 8808
Self Study Audio-Visual Program 1--UCC Workbook(s)	---	1966-1971	1966	Phil	UCC, Prac	same data in two books; William Schnader, Robert Braucher & John O. Honnold, Jr.; bound; 9169
Current Developments in Problems of Doing Business with Latin America	---	12/1-3/66	1966	CGFL	Bus, Intl	cosp. U of Miami Law Center and American Society of Intl Law
Principles of Modern Real Estate Law and Practice	---	11/30-12/1-2/67	1967	DC	RE	cosp. Young Lawyers' Section of the Bar Association of DC



Coursebook title	Number	Date	Year	Location	Subject(s)	Note(s)
National Conference on Continuing Legal Education	---	5/20-21/67	1967	DC	CLE	8786 & 8806; transcript; produced: "Combined Summary of Views of The 1967 National..." pamphlet
Competition, Cost Allocation, and Rate Design	---	3/8-10/67	1967	Hou	Bus	
Course of Study for Young Lawyers on Corporate Law Departments	---	6/23-29/68	1968	Mad	Corp	cosp. U of WI Law School
Pension and Profit Sharing Plans	---	11/14-16/68	1968	DC	Pens	
Basic Corporate Practice for the General Practitioner	---	11/21-23/68	1968	DC	Corp	cosp. Young Lawyers' Section of the Bar Association of DC
Buying, Selling & Merging Businesses	---	2/29-1/1/68	1968	Rich	Bus	cosp. Joint Comm. of CLE of the VA State Bar & the VA State Bar
The Defense of Criminal Cases	---	3/22-23/68	1968	Meriden	Crim	handout; 2 copies
Buying, Selling & Merging Businesses	---	4/25-27/68	1968	DC	Bus	cosp. Comm. on CLE of the Young Lawyers' Section of the Bar Assn of DC
1968 National Conference on Continuing Legal Education	---	10/11-13/68	1968	Chi	CLE	8785 & 8807; & Proceedings; produced: "Standards of Fair Conduct and Voluntary Cooperation"
An ALI-ABA Conference on Current Problems of Broker-Dealer Regulation	---	---	1968	---	Sec, Govt	supp. book by CCH, plus looseleaf transcript; no coursebook
An ALI-ABA Conference on New Perspectives in Securities Litigation	---	---	1968	---	Sec, Lit	supp. volume by CCH; no coursebook



Coursebook title	Number	Date	Year	Location	Subject(s)	Note(s)
Insuring Corporate Personnel and Professional Advisers Under Expanding Concepts of Responsibility	---	3/14-15/69	1969	NY	Ins, Prof	cosp. Assn of the Bar of the City of New York
Selected Modern Real Estate Concepts and Transactions	---	5/1-3/69	1969	LA	RE	with supp.
Social Security 1969: Rights and Remedies	---	5/19/69	1969	DC	Govt	with handouts
Problems in the Practice of Law under the Securities Act of 1933 and Relevant Sections of the Securities Exchange Act of 1934	---	6/15-21/69	1969	Mad	Sec	cosp. U of WI Law School; with supp. by CCH
Federal Civil Procedure	---	6/5-6/69	1969	Rich	Trl	cosp. Joint Comm. on CLE of the VA State Bar & the VA State Bar Assn
Selected Modern Real Estate Concepts and Transactions	3001	12/4-6/69	1969	Atl	RE	
Litigating with the Federal Government	3002	10/1-2/69	1969	DC	Lit, Govt	cosp. Bar Assn of DC
Federal Civil Procedure	3003	10/31-11/1/69	1969	Columbia	Trl	cosp. SC State Bar
Basic Federal Securities Law	3004	11/19-20/69	1969	DC	Sec	cosp. Bar Assn of DC; with supp.

## APPENDIX B

**ALI-ABA Short Video Webcasts and Audio  
Webcasts/Telephone Seminars, 2008-09****BANKRUPTCY LAW**

Strategies for Corporate Reorganization Planning in Today's  
Credit Crunch

**BUSINESS ORGANIZATIONS/CORPORATE LAW**

ABA Section of Business Law: Live From the Fall 2008 Meeting

Choice of Business Entity—2009 Update: Choosing and Using  
Business Forms in Uncertain Times

Credit Default Swaps

Fundamentals of Derivatives

Lender Misconduct in Consumer Foreclosures and Bankruptcy

Limited Liability Entities: LLCs, LLPs, & Limited Partnerships in  
Tough Economic Times

The M & A Transaction Today: How To Negotiate, Structure, and  
Close the Deal

U.S. Supreme Court Review—A Review of the Last Term and a  
Look to the Future

Wealth Planning

What To Do When the Feds Come Calling: Advising Business  
Clients in the Financial Crisis

**CIVIL LITIGATION/ADR**

*Allison Engine*: Supreme Court Changes Standards in False  
Claims

Commercial Litigation: Presenting a Compelling Plaintiff's Case  
and a Vigorous Defense

Digital Evidence: Generation, Admissibility and Weight  
Considerations

E-Discovery Strategies: Current Issues in Records Management,  
Litigation, Government Inquiries, and Ethics

Evidence, Procedure, and Trial Update: How You Can Win (or Lose) Your Case (Expert Witnesses, Sanctions, Spoliation, *Daubert*, and More)

False Claims Act & Proposed Amendments: An Update

The Financial Crisis: How Will These Disputes Be Resolved?  
National Experts Analyze Solution Mechanisms

*Hydrogen Peroxide's* Aftermath: New Restrictive Directives in Class Certification (Is It Applicable in All Class Actions?)

The Legality of Digital Image Copies of Paper Records: When Are Digital Copies Legally Acceptable & Credible?

Litigation Hold Letters

Negotiating Construction Disputes

## COMMERCIAL LAW/UNIFORM COMMERCIAL CODE

Data, Security, and Privacy Issues Facing the U.S. Financial Services Industry

Fallout from the Credit and Liquidity Crisis: Derivatives, Subprimes, and Real Estate Financing Update

Financial Services Industry Today: Enforcement Issues

Financial Services Industry Today: The Feds Speak on the Credit Crisis

New Directions in Consumer Financial Services: Housing Finance, Collection Practices, and Ethics (*Live from the ABA Section of Business Law Committee on Consumer Financial Services Winter 2009 Meeting*)

## CRIMINAL LAW

Challenging Confessions in Juvenile Delinquency Cases

Second Amendment Update: Gun Rights after *Heller*

## EMPLOYEE BENEFITS

The 25% Exception under ERISA's "Plan Assets" Rules: Withdrawals May Deposit Investment Funds Into ERISA Coverage

401k Hot Topics for Practitioners and Litigators

403(b) Plan Workshop: Implementing Recent Guidance

Cafeteria Plans: Complying with New IRS Regulations

Disability Claims in a Down Economy

EESA's New Executive Pay Practices for Covered Financial Institutions

Employee Benefits Law and Practice Update: Fall 2008

Employee Benefits Law and Practice Update: Spring 2009

EPCRS Workshop: Preventing and Correcting Qualified Plan Problems

ERISA Benefits Litigation: From *Pilot Life* and *Firestone* to *Glenn*—Where Are We Now?

ERISA Fiduciary Responsibility Update for Plan Fiduciaries, Employers, and Administrators

ERISA Litigation in Distress Situations: What's New and Important

ERISA Litigation: The Bailout Bill, the Financial Crisis, and the Impact on Your Practice

Executive Compensation Highlights: §409(A) Drafting, Design, Corrections, and Severance

Health Plans Update: COBRA, HIPAA, Cafeteria Plans, and Other Welfare Plan Issues

IRS' Compliance Resolution System for Employee Retirement Plans (EPCRS)

*Kennedy v. DuPont Savings*: The Supreme Court Kills Two Conflicts With One Decision

Medicare Secondary Payer Mandatory Reporting Requirements

New COBRA, HIPAA, and Other Health Plan Provisions from ARRA 2009 (and Other Recent Legislation)

New Expanded Mental Health & Substance Abuse Parity: The Wellstone-Domenici Mental Health Parity & Addiction Equity Act

Plan Administrator Year-End "TO-DOs" for 401(k) and 403(b) Retirement Plans

Plan Administrator Year-End “TO-DOs” for Welfare Plans

Section 409A Compliance and Corrections: Ask the Experts—Part II

## EMPLOYMENT AND LABOR LAW

ADA Amendments Act of 2008 and the Dramatic Expansion of the ADA

Arbitration of Employment Disputes: Emerging Issues

*Crawford*: The Supreme Court Redraws Retaliation Law

Electronic Discovery for Employment Lawyers

Emerging Issues of Employee Blogging: What Every Employer Should Know

Employment Law Update: Spring 2009

Genetic Information Nondiscrimination Act

Immigration: Worksite Enforcement and Employer Compliance Issues for 2009

Ledbetter Reversed: The New Fair Pay Act of 2009

Litigating Wage and Hour Class Actions

NEW Family and Medical Leave Act Regulations

NEW LAW: ADA Amendments Act of 2008

New Whistleblower Protection: The McCaskill Amendment to the Economic Stimulus Bill

Non-Compete Agreements

Non-Compete Agreements and Trade Secrets: Update

Reductions in Force Claims

“Regarded as” Disability Claims Under the ADA: Before and After the Amendments

U.S. Supreme Court Update: Employment Law

## ENVIRONMENTAL LAW

Drafting Effective Contracts for Green Design, Green Building and Green Leasing: Is it Easy Being Green?

Environmental Due Diligence in the Era of Climate Change

Green Building Essentials for Lawyers: The Big Picture from a Real Estate Attorney and a Green Building Consultant

Negotiating and Using Environmental Insurance Policies and Avoiding Claim Pitfalls

Strategic Adaptation to Climate Change: Challenges and Opportunities for Business

## **ESTATE PLANNING**

Advanced Estate and Tax Planning for Same-Sex Couples

Advanced Estate Planning Practice Update: Autumn 2008

Advanced Estate Planning Practice Update: Summer 2009

Advanced Estate Planning Practice Update: Winter 2009

Advising Investment Fraud Victims: Tax, Securities and Bankruptcy Issues

Asset Protection Trust Planning

Business Succession and Transition Planning for Closely Held or Family Owned Businesses

Charitable Remainder and Lead Trusts: Avoiding Bad Heir Days and Near-Death Tax Experiences

Estate and Distribution Planning with Qualified Plans and IRAs

Estate Planning for the Aging Boomer: Advising a Booming Client Population

Estate Planning in the Face of Litigation: Current Dilemmas and Malpractice Traps

Estate Planning in Turbulent Times: CYA! (Cover Your Assets)

Irrevocable Trusts Under Attack: The Domestic Relations Angle

Medicare Set Aside Trusts: Critical Issues Surrounding Personal Injury Awards

Post Mortem Planning for the Closely Held Business Owner

Ratner and Brody Rethink Insurance Uses in Estate Planning in the New Economy



Reproductive Technology's Impact on Estate Planning: Children of the New Biology

Special Needs Trusts: What Every Personal Injury Attorney and Estate Planning Attorney Must Know

Steve Akers and Lou Harrison on Family Limited Partnerships after *Mirowski* et al.

## INTELLECTUAL PROPERTY

ADR in IP Litigation

Copyright Fair Use: What's New

A Cost-Effective Patent Litigation Defense: Indefiniteness

DMCA Section 1201: Ten Years of Copy Protection and Anti-Circumvention

E Marketing: IP Issues for Business Lawyers

The Google Book Search Settlement: Who Won?

Internet Security and Privacy Best Practices for Non-Specialists

ISP Immunity: Communications Decency Act S. 230

Managing Intellectual Property Liability and Risks in e-Marketing and Web Sites

Museum Intellectual Property: Myths, Updates, and International Highlights

Negotiating Business Issues in Copyright and Trademark License Agreements: Getting the Best Deal in a Changing Global Economy

Negotiating Technology Agreements

Protecting IP When the Licensor/Licensee Gets Into Trouble

*Quanta v. LG*: What You Should Know

Ten Years Under the Digital Millennium Copyright Act

*Tiffany vs. eBay*: Roadmap for Avoiding Liability or Short Detour for Trademark Owners?

Transformers Wanted? *In re Bilski* Cuts Back on Business Methods

Why Location Matters: Legal Issues of GPS, Navigation Systems and Other Location-Based Services

## INTERNATIONAL PRACTICE

Doing Global Business in Times of Crisis: Issues for the New Administration and Clients

International Commercial Arbitration: What You Can Learn from the ALI Restatement Project (*cosponsored by the American Law Institute*)

Research Sources and Strategies in International Commercial Arbitration: An Insider's Guide

## PRACTICE MANAGEMENT

E-Due Diligence in Law Firm Hiring: A Look at the Issues (*cosponsored by NALP—The Association for Legal Career Professionals<sup>TM</sup>*)

Lawyer Development Institute 2009 (*cosponsored by NALP—The Association for Legal Career Professionals<sup>TM</sup>*)

Managing Law Firm Recruitment and Retention in a Downturn (*cosponsored by NALP—The Association for Legal Career Professionals<sup>TM</sup>*)

Managing Law Firm Talent: Best Practices in Lawyer Career Development (*cosponsored by NALP—The Association for Legal Career Professionals<sup>TM</sup>*)

Professional Development Institute 2008 (*cosponsored by NALP—The Association for Legal Career Professionals<sup>TM</sup>*)

Strategic Outplacement for Associates and Partners (*cosponsored by NALP—The Association for Legal Career Professionals<sup>TM</sup>*)

## PROFESSIONAL RESPONSIBILITY/ETHICS

Attorney-Client Privilege and Work Product Protection 2008

“Broken Promises”: The Ethics of Attorney Advertising

Confidentiality and Attorney-Client Communications

Confidentiality and Ethics in a Wired World

Conflicts of Interest for the Business Lawyer

Developments in Legal Ethics 2009: Using Screens in Private Practice—When, Why, and How? (*cosponsored by the American Law Institute*)

Ethical Considerations in the Public Sector: Counseling Government Clients Effectively

Ethics for the Business Lawyer

Ethics in E-Discovery

Ethics Issues in Estate Planning

The Ethics of Negotiation

Ethics Update 2008: Confidentiality and Conflicts of Interest

Ethics Update 2008: Control, Communication, and Competence

Good People, Bad Choices, and Life Lessons from the White House

Identifying Ethical, Bias, and Substance Abuse Issues in Your Practice

Internal Investigations in Law Firms: Ethics, Confidentiality, and Other Conflicts That May Arise

Lawyer Ethics and Risk Management in an Economic Downturn

Legal Fees and Billing: Ethics and Practice

Negotiation Ethics (*cosponsored by the New York City Bar*)

The Shrinking Boundaries of Attorney-Client Privilege

Spoliation of Digital Evidence: Ethics and Case Law Update—New Forensics and Emerging Standards for Discovery and Abuse

Top Ten Ethical Challenges Facing Estate Planners (*cosponsored by the American College of Trust and Estate Counsel*)

When Bankruptcy Comes Calling on Your Client: Five Common Ethical Mistakes

Will You Take My Case? The Ethics and Practice of Client Selection

## PROFESSIONAL SKILLS

Communicating Across the Gender Gap: What Lawyers Need To Know (*cosponsored by the New York City Bar*)

Deposing Expert Witnesses: Ten Steps to Success

Effective Legal Negotiation and Settlement

Effective Legal Negotiation: Negotiator Styles and the Six Stages of Negotiation

Getting and Staying Organized: Effective Work Habits for Successful Lawyers

Legal Writing at the Micro Level: Making Paragraphs and Sentences Coherent and Forceful

Mauet's Trial Evidence: Is It Reliable? (*cosponsored by the Professional Education Group, Inc.*)

Mauet's Trial Evidence: Is It Right? (*cosponsored by the Professional Education Group, Inc.*)

May Your Law Practice Be With You: Practicing Anywhere from the Courthouse to the Closest Starbucks

Negotiation Strategies for Lawyers and Business Professionals (*cosponsored by the New York City Bar*)

Persuasive Legal Writing: A Workshop for Litigators

Problem Counsel, Problem Witnesses at Depositions

Real World Document Drafting®: Best Efforts, Good Faith, and Fair Dealing

Real World Document Drafting®: Defaults, Remedies, and Liability Limitation Provisions

Real World Document Drafting®: Indemnification Provisions in Contracts and Other Documents

Real World Document Drafting®: Starting Out Right

Tightwad Technology for Tough Times: 60+ Tips for Free and Low-Cost Resources for Your Law Practice

Time Management for Lawyers: Optimizing Your Work Day

Witness Deposition Tactics: The Games People Play

Writing for Effect: A Workshop for Lawyers

Writing To Be Read and Understood: A Workshop for Lawyers

**REAL ESTATE/LAND USE**

The ABCs of PPPs: How To Structure Public-Private Partnerships for Real Estate Development Projects

Commercial Real Estate Defaults and Workouts

Commercial Real Estate Financing, the Capital Markets, and the Liquidity Crunch

Commercial Real Estate Sales and Acquisitions: Today's Credit Market, Due Diligence, Representations, and Warranties

Condos & Planned Communities: Bulk Sale of Units, Homes, and Lots in Today's Shifting Economy

Handling Commercial Real Estate Defaults: Workouts

Housing & Economic Recovery Act & Emergency Economic Stabilization Act: For Real Estate Lawyers Who Counsel Lenders, Borrowers, and Builders

Managing Hospitality Assets through the Downturn: Operations, Management, and Financing Workshop

Reworking Opinion Letters for the Mortgage Loan and Real Estate Transaction Comeback: What's Necessary vs. What's Dangerous

**SCIENCE AND TECHNOLOGY**

New Digital Media: Recent Law and Emerging Trends

**SECURITIES LAW**

Current Issues in Drafting Risk Factors for 2009 SEC Filings

Hedge Fund Update: Current Developments and Their Impact

Moving from GAAP to IFRS (International Financial Reporting Standards)

New SEC Regulation FD (Fair Disclosure) Guidance: Will Blogs Suffice?

SEC and State Enforcement and Litigation: Issues Arising from the Recent Market Upheaval on Wall Street

SEC Executive Compensation Disclosure in 2009: EESA, the CD&A, and More

SEC Regulation and Practice: Advice from the Experts

**TAXATION**

Federal Tax Treatment of Debt Workouts

Generation Skipping Transfer Tax: Common Mistakes and How to Prevent or Fix Them

New Proposed Tax Preparer Regulations and Enhanced Circular 230

New Tax Return Preparer Standards: Final Regulations

**TORTS/PROFESSIONAL MALPRACTICE**

*Exxon*: Supreme Court Rules on Preemption and Punitive Damages



## APPENDIX C

## ALI-ABA Courses of Study, 2008-09

## BANKRUPTCY LAW

**Fundamentals of Bankruptcy Law**

May 7-9, 2009, Chicago, Illinois, and live webcast

***Planning Chairs:*** *K. John Shaffer, Los Angeles, Calif., Bruce A. Markell, Las Vegas, Nev.*

**Chapter 11 Business Reorganizations**

May 14-16, 2009, Boston, Massachusetts, and live webcast

***Planning Chairs:*** *Kenneth N. Klee, Los Angeles, Calif., Sally S. Neely, Los Angeles, Calif.*

## BUSINESS ORGANIZATIONS/CORPORATE LAW

**Corporate Mergers and Acquisitions**

October 23-24, 2008, New York, New York, and live webcast

***Planning Chairs:*** *Franci J. Blassberg, New York, N.Y., Elliott V. Stein, New York, N.Y.*

**Tax Exempt Charitable Organizations**

November 13-14, 2008, Washington, D.C., and live webcast

Cosponsored by the ABA Section of Taxation

***Planning Chairs:*** *Marcus S. Owens, Washington, D.C., Douglas N. Varley, Washington, D.C., Diara M. Holmes, Washington, D.C.*

**Legal Issues in Museum Administration**

April 1-3, 2009, Boston, Massachusetts, and live webcast

Cosponsored by The Smithsonian Institution with the cooperation of the American Association of Museums

***Program Chairs:*** *Lauryn H. Guttenplan, Washington, D.C., Maureen Whalen, Los Angeles, Calif.*

## COMMERCIAL LAW/UNIFORM COMMERCIAL CODE

**The Subprime Mortgage Crisis: From A to Z** *(new course of study)*

September 18-19, 2008, Washington, D.C., and live webcast

***Planning Chairs:*** *Robert A. Cook, Hanover, Md., Alan S. Kaplinsky, Philadelphia, Pa.*

**Commercial Lending and Banking Law – 2009**

January 29-31, 2009, Scottsdale, Arizona, and live webcast

**Planning Chair:** *Patrick A. Guida, Providence, R.I.*

**Product Distribution and Marketing**

March 18-20, 2009, Charleston, South Carolina, and live webcast

**Planning Chair:** *Andre R. Jaglom, New York, N.Y.*

**EMPLOYEE BENEFITS****Retirement, Deferred Compensation, and Welfare Plans of Tax-Exempt and Governmental Employers**

September 4-6, 2008, Washington, D.C., and live webcast

**Planning Chairs:** *David L. Raish, Boston, Mass., Louis T. Mazawey, Washington, D.C.*

**Pension, Profit-Sharing, Welfare, and Other Compensation Plans**

October 2-4, 2008, Washington, D.C., and live webcast

March 18-20, 2009, San Francisco, California, and live webcast

**Planning Chairs:** *Pamela Baker, Chicago, Ill., William F. Sweetnam, Washington, D.C. Planning Chair Emeritus: Mervin M. Wilf, Philadelphia, Pa., and Cambridge, Mass.*

**Fundamentals of Employee Benefits Law**

March 5-7, 2009, Walt Disney World (Orlando), Florida, and live webcast

**Planning Chair:** *Pamela D. Perdue, St. Louis, Mo.*

**Executive Compensation: Strategy, Design, and Implementation**

June 18-19, 2009, New York, New York, and live webcast

**Planning Chairs:** *Max J. Schwartz, New York, N.Y., Scott P. Spector, Mountain View, Calif.*

**EMPLOYMENT AND LABOR LAW****Current Developments in Employment Law**

July 24-26, 2008, Santa Fe, New Mexico, and live webcast

**Planning Chairs:** *Robert B. Fitzpatrick, Washington, D.C., Frank C. Morris, Jr., Washington, D.C., Margaret M. Madden, New York, N.Y.*

**Airline and Railroad Labor and Employment Law: A Comprehensive Analysis**

October 30-November 1, 2008, Washington, D.C., and live webcast

***Planning Chair:*** Joseph Z. Fleming, Miami, Fla.

**Advanced Employment Law and Litigation**

December 4-6, 2008, Washington, D.C., and live webcast

***Planning Chairs:*** Peter M. Panken, New York, N.Y., Robert B. Fitzpatrick, Washington, D.C.

**Litigating Employment Discrimination and Employment-Related Claims and Defenses in Federal and State Courts**

March 5-7, 2009, Scottsdale, Arizona, and live webcast

***Planning and Program Chairs:*** Kay H. Hodge, Boston, Mass., Debra S. Katz, Washington, D.C.

**ENTERTAINMENT, ARTS, AND SPORTS LAW**

**Entertainment, Arts, and Sports Law**

January 15-17, 2009, Los Angeles, California

***Planning Chairs:*** Joseph Z. Fleming, Miami, Fla., Pamela R. Lester, Hopewell, N.J.

**ENVIRONMENTAL LAW**

**The Impact of Environmental Law on Real Estate and Business Transactions: Brownfields and Beyond**

October 2-3, 2008, Boston, Massachusetts, and live webcast

***Planning Chair:*** David B. Farer, Westfield, N.J.

**Clean Air: Law, Policy, and Practice**

December 3-5, 2008, Washington, D.C., and live webcast

Cosponsored by the Environmental Law Institute

***Planning Chairs:*** Peter Hsiao, Los Angeles, Calif., Jonathan Martel, Washington, D.C., Kathryn B. Thomson, Washington, D.C.

**Environmental Law**

February 4-6, 2009, Washington, D.C. (Bethesda, Md.) and live webcast

Cosponsored by the Environmental Law Institute and The Smithsonian Institution

***Planning Chairs:*** *Pamela R. Esterman, New York, N.Y., Daniel Riesel, New York, N.Y.*

**Global Warming: Climate Change and the Law**

April 2-3, 2009, Washington, D.C., and live webcast

Cosponsored by the Environmental Law Institute

***Planning Chairs:*** *Michael B. Gerrard, New York, N.Y., Scott E. Schang, Washington, D.C., Robert A. Wyman, Jr., Los Angeles, Calif.*

**Clean Water Act: Law and Regulation**

April 23-24, 2009, Washington, D.C., and live webcast

Cosponsored by the ABA Section of Environment, Energy, and Resources and the Environmental Law Institute

***Planning Chairs:*** *D. Randall Benn, Washington, D.C., Rachel L. Jean-Baptiste, Washington, D.C., Steven M. Neugeboren, Washington, D.C.*

**Criminal Enforcement of Environmental Laws**

May 14, 2009, Washington, D.C., and live webcast

***Planning Chairs:*** *Judson W. Starr, Washington, D.C., Joseph G. Block, Washington, D.C.*

**Environmental Litigation**

June 24-27, 2009, University of Colorado School of Law, Boulder, and live webcast

Sponsored with the cooperation of the University of Colorado School of Law

***Planning Chair:*** *Daniel Riesel, New York, N.Y.*

## ESTATE PLANNING

### **Estate Planning for the Family Business Owner**

July 9-11, 2008, Boston, Massachusetts, and live webcast

Cosponsored by the ABA Section of Real Property, Trust and Estate Law and the ABA Section of Taxation

***Planning Chairs:*** *Steve R. Akers, Dallas, Tex., Mark B. Edwards, Charlotte, N.C., Myron E. Sildon, Kansas City, Mo.*

### **Representing Estate and Trust Beneficiaries and Fiduciaries**

July 17-18, 2008, San Francisco, California, and live webcast

***Planning Chairs:*** *Donald P. DiCarlo, Jr., Villanova, Pa., Steven M. Fast, Hartford, Conn., Robert Whitman, Hartford, Conn.*

### **International Trust and Estate Planning**

July 31-August 1, 2008, Santa Fe, New Mexico, and live webcast

***Planning Chairs:*** *Virginia F. Coleman, Boston, Mass., Michael G. Pfeifer, Washington, D.C.*

### **Basic Estate and Gift Taxation and Planning**

August 20-22, 2008, Chicago, Illinois, and live webcast

***Planning Chair:*** *Stanley L. Ruby, Cincinnati, Ohio*

### **Sophisticated Estate Planning Techniques**

September 4-5, 2008, Boston, Massachusetts, and live webcast

Cosponsored by Massachusetts Continuing Legal Education, Inc.

***Planning Chairs:*** *Edward J. Beckwith, Washington, D.C., Virginia F. Coleman, Boston, Mass.*

### **Planning Techniques for Large Estates**

November 17-21, 2008, San Francisco, California, and live webcast

April 20-24, 2009, New York, New York

***Planning Chairs:*** *Malcolm A. Moore, Seattle, Wash., Mervin M. Wilf, Philadelphia, Pa., and Cambridge, Mass.*

### **Advanced Estate Planning Techniques**

February 19-21, 2009, Maui, Hawaii, and live webcast

***Planning Chairs:*** *Lawrence P. Katzenstein, St. Louis, Mo., Jeffrey N. Pennell, Atlanta, Ga.*



**Fundamentals of Estate Planning**

June 11-13, 2009, Boston, Massachusetts, and live webcast

*Planning Chair: Mary Ann Mancini, Washington, D.C.*

**Estate Planning in Depth**

June 14-19, 2009, University of Wisconsin Law School, Madison

Cosponsored by Continuing Legal Education for Wisconsin (CLEW)

*Planning Chairs: M. Read Moore, Chicago, Ill., Nancy G. Henderson, Rancho Santa Fe, Calif.*

**INSURANCE LAW****Conference on Life Insurance Company Products: Current SEC, FINRA, Insurance, Tax, and ERISA Regulatory and Compliance Issues**

November 13-14, 2008, Washington, D.C., and live webcast

*Planning Chairs: Richard T. Choi, Washington, D.C., Stephen E. Roth, Washington, D.C.*

**PROFESSIONAL SKILLS****Real World Document Drafting®: Form, Style, and Substance**

September 12, 2008, New York, New York

Cosponsored by the New York City Bar

*Instructor: Marvin Garfinkel, Philadelphia, Pa.*

**Trials of the Century**

September 24, 2008, New York, New York

Cosponsored by the New York City Bar

April 23, 2009, Philadelphia, Pennsylvania

*Instructor: Todd Winegar, Salt Lake City, Utah*

**Writing To Persuade**

October 2, 2008, New York, New York

Cosponsored by the New York City Bar

December 9, 2008, Philadelphia, Pennsylvania

*Instructor: Timothy P. Terrell, Atlanta, Ga.*

**Effective Depositions: Techniques and Strategies**

October 29, 2008, Philadelphia, Pennsylvania

*Instructors: David A. Sonenshein, Philadelphia, Pa., Howard Bruce Klein, Philadelphia, Pa.*

**Communicating Across the Gender Gap: What Lawyers Need To Know**

December 9, 2008, New York, New York, and live webcast

Cosponsored by the New York City Bar

*Instructors: Steven D. Stark, Boston, Mass., Sarah Wald, Boston, Mass.*

**Public Speaking for Lawyers**

January 30, 2009, New York, New York

Cosponsored by the New York City Bar

*Instructors: Whitney North Seymour, Jr., New York, N.Y., Conrad Teitell, Stamford, Conn.*

**So Little Time, So Much Paper: Organization and Time Management for Lawyers**

February 2, 2009, New York, New York

Cosponsored by the New York City Bar

*Instructor: Margaret Spencer Dixon, Kensington, Md.*

**Advanced Writing and Editing for Lawyers**

April 16, 2009, Philadelphia, Pennsylvania

*Instructor: Timothy P. Terrell, Atlanta, Ga.*

**Gain the Edge®! Negotiation Strategies for Lawyers and Business Professionals**

April 17, 2009, New York, New York, and live webcast

Cosponsored by the New York City Bar

*Instructor: Martin Latz, Phoenix, Ariz.*

**REAL ESTATE/LAND USE****Modern Real Estate Transactions**

July 30-August 2, 2008, Boston, Massachusetts, and live webcast

*Planning Chairs: John D. Hastie, Norman, Okla., Mark A. Senn, Denver, Colo., Philip D. Weller, Dallas, Tex.*

**Land Use Institute: Planning, Regulation, Litigation, Eminent Domain, and Compensation**

August 13-16, 2008, Boston, Massachusetts, and live webcast

Cosponsored by the Center for Urban and Environmental Solutions, Florida Atlantic University

***Planning Chair:*** Frank Schnidman, Ft. Lauderdale, Fla. ***Planning Co-Chair:*** Gideon Kanner, Los Angeles, Calif.

**Creative Tax Planning for Real Estate Transactions**

September 25-27, 2008, Chicago, Illinois, and live webcast

***Planning Chairs:*** Blake D. Rubin, Washington, D.C., Richard E. Levine, Baltimore, Md.

**Resort Real Estate and Clubs: Formation, Documentation, and Operation**

November 13-14, 2008, Savannah, Georgia, and live webcast

***Planning Chair:*** Jo Anne P. Stubblefield, Atlanta, Ga.

**Condemnation 101: Fundamentals of Condemnation Law and Land Valuation**

January 8-10, 2009, Miami Beach, Florida

***Planning Chairs:*** Andrew P. Brigham, Jacksonville, Fla., Jack R. Sperber, Denver, Colo.

**Eminent Domain and Land Valuation Litigation**

January 8-10, 2009, Miami Beach, Florida, and live webcast

***Planning Chairs:*** Leslie A. Fields, Denver, Colo., Joseph T. Waldo, Norfolk, Va.

**Commercial Real Estate Financing: Strategies for Changing Markets and Uncertain Times**

January 15-17, 2009, Coral Gables, Florida, and live webcast

***Planning Chairs:*** Richard R. Goldberg, Philadelphia, Pa., Andrea M. Mattei, New York, N.Y.

**Drafting (and Re-Drafting) Documents for Condominiums and Planned Communities in Troubled Times: Practice and Principles**

February 26-28, 2009, San Antonio, Texas, and live webcast

***Planning Chair:*** Carl H. Lisman, Burlington, Vt.

**Commercial Real Estate Defaults, Workouts, and Reorganizations**

March 5-7, 2009, Walt Disney World (Orlando), Florida, and live webcast

***Planning Chair:*** John D. Hastie, Norman, Okla.

**Commercial Real Estate Leases: Selected Issues in Drafting and Negotiating in a Distressed and Troubled Market**

May 28-29, 2009, Chicago, Illinois, and live webcast

*Planning Chairs:* Richard R. Goldberg, Philadelphia, Pa., Mark J. Levick, New York, N.Y., Mark A. Senn, Denver, Colo.

**SECURITIES LAW**

**Investment Company Regulation and Compliance**

July 16-18, 2008, Boston, Massachusetts, and live webcast

*Planning Chairs:* Thomas S. Harman, Washington, D.C., Karen L. Skidmore, San Mateo, Calif.

**Postgraduate Course in Federal Securities Law**

July 24-25, 2008, San Francisco, California, and live webcast

*Planning Chairs:* Stanley Keller, Boston, Mass., John F. Olson, Washington, D.C.

**FINRA/SEC Compliance and Enforcement: The Changing Broker-Dealer and Adviser Regulatory Landscape—Staying Ahead of the Curve**

September 18-19, 2008, Fordham University School of Law, New York, New York, and live webcast

Sponsored with the cooperation of the Philip D. Reed Chair Lecture Series and the Corporate Law Center, Fordham University School of Law

*Planning Chair:* Clifford E. Kirsch, New York, N.Y.

**Investment Adviser Regulation**

January 15-16, 2009, Fordham University School of Law, New York, New York, and live webcast

Sponsored with the cooperation of the Philip D. Reed Chair Lecture Series and the Corporate Law Center, Fordham University School of Law

*Planning Chair:* Clifford E. Kirsch, New York, N.Y.

**Regulation D Offerings and Private Placements**

March 12-14, 2009, Scottsdale, Arizona, and live webcast

Cosponsored by the Securities Law Committee of the Federal Bar Association

*Planning Chairs:* Alan J. Berkeley, Washington, D.C., and London, England, Robert B. Robbins, Washington, D.C.

**Fundamentals of Securities Law**

April 30-May 1, 2009, Chicago, Illinois, and live webcast

***Planning Chairs:*** Alan J. Berkeley, Washington, D.C., and London, England, Thomas Lee Hazen, Chapel Hill, N.C.

**Broker-Dealer Regulation**

June 18-19, 2009, Fordham University School of Law, New York, New York, and live webcast

Cosponsored by the Securities Law Committee of the Federal Bar Association with the cooperation of the Philip D. Reed Chair Lecture Series and the Corporate Law Center, Fordham University School of Law

***Planning Chairs:*** W. Hardy Callcott, San Francisco, Calif., K. Susan Grafton, Washington, D.C., Andre E. Owens, Washington, D.C.

**TAXATION****Consolidated Tax Return Regulations**

September 25-26, 2008, Washington, D.C., and live webcast

Cosponsored by the ABA Section of Taxation

***Planning Chair:*** Mark J. Silverman, Washington, D.C.

**Corporate Taxation**

April 2-3, 2009, Washington, D.C., and live webcast

Cosponsored by the ABA Section of Taxation

***Planning Chairs:*** Julie A. Divola, San Francisco, Calif., Rose L. Williams, New York, N.Y., Philip B. Wright, St. Louis, Mo.

**How To Handle a Tax Controversy at the IRS and in Court:  
From Administrative Audit Through Litigation**

May 28-29, 2009, San Antonio, Texas, and live webcast

Sponsored with the cooperation of the ABA Section of Taxation

***Planning Chair:*** Steven C. Salch, Galveston, Tex. ***Planning Vice-Chairs:*** Karen L. Hawkins, Washington, D.C., Gerald A. Kafka, Washington, D.C.

**TORTS/PROFESSIONAL MALPRACTICE****Asbestos Litigation: Where Is It Going? When Will It End?**

December 4-5, 2008, San Antonio, Texas, and live webcast

***Planning Chairs:*** John D. Aldock, Washington, D.C., Steven Kazan, Oakland, Calif.